

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE KIMBERLY J. MUELLER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Sacramento, California

No. 2:20-CR-00023

LAWRENCE MACKEN,

Monday, July 20, 2020

9:50 a.m.

Defendant.

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTION TO SUPPRESS AND STATUS CONFERENCE
(*Proceedings held via Zoom video conference.*)

--oOo--

APPEARANCES:

For the Government:

UNITED STATES ATTORNEY'S OFFICE

AARON PENNEKAMP

Assistant U.S. Attorney

501 I Street, Suite 10-100

Sacramento, CA 95814

For the Defendant:

OFFICE OF THE FEDERAL DEFENDER

HANNAH LABAREE

Assistant Federal Defender

801 I Street, Third Floor

Sacramento, CA 95814

Official Reporter:

KACY PARKER BARAJAS

CSR No. 10915, RMR, CRR, CRC

UNITED STATES DISTRICT COURT

501 I Street, Suite 4-200

Sacramento, CA 95814

kbarajas.csr@gmail.com

*Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.*

1 SACRAMENTO, CALIFORNIA, MONDAY, JULY 20, 2020, 9:50 AM

2 --oOo--

3 THE CLERK: Calling criminal case 20-23, United States
4 versus Lawrence Macken. This is on for a status conference and
5 motion hearing.

6 MS. LABAREE: Your Honor, I'm getting reports that the
7 public line is still really, really hard to hear on. I have
8 family members phoning in to listen to the Macken hearing. I'm
9 not sure if there's anything we can do about that, but I did
10 want to put that on the record.

11 THE COURT: Ms. Schultz.

12 THE CLERK: I monitor the public line as the
13 proceedings continue. I just checked it, as Ms. Labaree was
14 saying that, and it's fine through the court's line. So I call
15 in just like the public and it's clear. So I don't know if it
16 has to do with the connection or location or something like
17 that.

18 THE COURT: All right.

19 All right. If multiple persons, Ms. Labaree, are
20 experiencing that and you can collect detailed information on
21 how they're connecting from where, that will help us, if
22 they're telling you they cannot hear. I understand your
23 investigator may be trying to monitor. There's always a
24 transcript of the proceedings that could be made available if
25 needed.

1 MS. LABAREE: Okay. Thank you, your Honor.

2 THE COURT: Are we waiting for Mr. Macken?

3 THE CLERK: Yes, your Honor. They're bringing him
4 right now.

5 THE COURT: All right.

6 THE REPORTER: Your Honor, could I just interrupt
7 really quickly.

8 THE COURT: Yes.

9 THE REPORTER: Could I please, while your Honor is
10 speaking, I need to have everybody muted so I can hear you
11 clearly.

12 THE COURT: Thank you, Ms. Barajas. Yes. Good rule,
13 generally. So I suppose the best practice is to stay muted
14 until I've called you. I call on attorneys when I'm ready to
15 hear from them. So wait for me to call on you and unmute then.

16 All right. Appearances, please, for the government.

17 MR. PENNEKAMP: Good morning, your Honor.
18 Aaron Pennekamp for the United States.

19 THE COURT: Good morning to you.

20 For the defense.

21 MS. LABAREE: Good morning, your Honor.

22 Hannah Labaree for Mr. Macken. Mr. Macken is appearing via
23 video teleconference from the United States's Marshal's lockup.
24 He has consented to appearing in this manner as opposed to
25 physical presence. That's it.

1 THE COURT: Good morning, Ms. Labaree.

2 Mr. Macken, you can see and hear the Court?

3 THE DEFENDANT: Yes, I can. Good morning, your
4 Honor.

5 THE COURT: All right. Good morning to you.

6 Ms. Labaree, just to clarify, I don't know that
7 consent is essential or that the Court needs to make
8 particularized findings given the nature of this hearing. Do
9 you disagree?

10 MS. LABAREE: I don't. I just was being extra
11 cautious.

12 THE COURT: All right.

13 I have a few questions based on the motion that's
14 pending. First of all, there is a reply that does reply to
15 some of the government's arguments. Mr. Pennekamp, did you
16 have any focused response to the information in the reply,
17 particularly with respect to standing? Anything more to say on
18 standing? Do you believe now the defense has established
19 standing?

20 MR. PENNEKAMP: Your Honor, we would submit on the
21 question of standing. Our concern was just that Mr. Macken had
22 not to that point submitted any evidence as to his standing,
23 but for purposes of this motion, we are prepared to submit on
24 that matter.

25 THE COURT: All right. Thank you for that

1 clarification. Then I have a number of questions for each of
2 you regarding the substance of the motion. So I want to make
3 certain I understand the government's position. Even though
4 the government does say no arrest, it pivots pretty quickly to,
5 well, if there was an arrest, the government still prevails
6 here because there was probable cause or the vehicle search
7 exception applies. Are you effectively conceding that there
8 likely was an arrest here, Mr. Pennekamp?

9 MR. PENNEKAMP: No, not at all, your Honor. We are
10 making those arguments in the alternative. Our primary
11 position is that, yes, given the information that the officers
12 knew at the time of the stop and at the time of the search, we
13 believe they did have probable cause justifying an arrest, if
14 it occurred, and we believe they have probable cause justifying
15 the search if the search occurred. But we don't think the
16 Court needs to reach the probable cause question to decide this
17 motion and resolve it in the government's favor.

18 Our position is and at this point my understanding is
19 that Mr. Macken has conceded that at the very least the
20 officers had reasonable suspicion at the time of the stop and
21 the search that Mr. Macken had a weapon inside his vehicle.
22 And on that basis, as well as for, you know, the additional
23 things that the officers saw following the stop, including
24 Mr. Macken's noncompliance with the officers' commands, the
25 officers were justified in taking the steps that they did

1 without those steps resulting in a finding that an arrest
2 occurred at the time of the stop.

3 So we are certainly not conceding that an arrest
4 happened, and we think the Court would be more than justified
5 in finding that in the circumstances of this case that this was
6 entirely consistent with a *Terry* stop.

7 THE COURT: All right. Let me just clarify, and then
8 I'll ask Ms. Labaree if she's conceding reasonable suspicion
9 just for clarity.

10 On the arrest, I understand there's no bright line,
11 but I'm assuming you sent me all the cases that I would
12 consider in looking at the fact of Mr. -- I'm sorry -- Macken,
13 Mr. Macken's being handcuffed in the car, the number of
14 minutes, approximately five; do I have that right, in the car
15 before the gun was found. And also the number of officers,
16 there were quite a few officers here as the defense points out.
17 So have you pointed me to every case that could inform the
18 Court's thinking about whether or not those factors rise to the
19 level of an arrest?

20 MR. PENNEKAMP: As a general matter, yes, your Honor.
21 I mean, we would specifically point the Court to the Ninth
22 Circuit's most recent decisions in the *United States versus*
23 *Vandergroen* case. We cited the district court opinion in our
24 brief. After we filed our brief, the Ninth Circuit resolved
25 the pending appeal in that case, and I think if you look

1 closely at the facts involved in the *Vandergroen* case, which
2 are described at length in the district court opinion, that
3 case is strikingly similar to this one, and the Ninth Circuit
4 affirmed the district court's decision finding that no arrest
5 had occurred and that this was entirely consistent with a *Terry*
6 stop. So we think that case is directly on point.

7 There is one other case that I was looking at
8 yesterday, another Ninth Circuit case called *United States*
9 *versus Morris*, and you can find that at 417 fed appendix 713.
10 It's another case involving just reports of an individual with
11 a gun, no separate violent act, but the officers used force in
12 *Terry* stopping that person, including handcuffing him, putting
13 him in a vehicle. I think in that case they even had him laid
14 prone on the ground, and the Ninth Circuit nevertheless held
15 that the circumstances in that case did not rise to the level
16 of an arrest. So we again think that case supports our
17 position.

18 THE COURT: Ms. Labaree, do you concede reasonable
19 suspicion, as the government argues, and secondly, any response
20 to *Vandergroen*, if I'm saying that correctly, and *Morris*?

21 MS. LABAREE: We do concede reasonable suspicion, yes.
22 I recognize that the tip here was reliable as to a former law
23 enforcement officer, and we don't take issue with it. Our
24 argument is more that the substance of that tip wasn't fully
25 accounted for by the officers, and I think I make that clear in

1 my briefing. Although, if the Court is interested in that, I'd
2 like to speak more on it because I think it does lie at the
3 crux of this case. But as a general matter, no, we're not
4 arguing about the reliability of the tip. We're not arguing
5 about reasonable suspicion that a crime was being committed
6 potentially, right.

7 As to *Vandergroen*, you know, the first thing is that
8 clearly this was filed last week after the reply, and I didn't
9 have a chance to respond in writing to it. So if that case is
10 going to become the sort of decision point here, I would ask
11 for the opportunity to respond in writing.

12 Another point is that since we aren't challenging the
13 reasonable suspicion, the first *Vandergroen* opinion, since
14 there's these two Ninth Circuit opinions on it, is apropos of
15 nothing here. So the second one does relate to our case in
16 terms of the issues decided.

17 The Fourth Amendment's touchstone is the totality of
18 the circumstances. It's reasonableness. And it's always
19 highly fact specific. It's not clear to me what arguments the
20 defendant in *Vandergroen* made as to whether they conceded or
21 not that he was cooperative, what extent that cooperation, you
22 know, was or wasn't happening.

23 You know, I looked at the Northern District opinion
24 which has a little bit of a greater explanation of the facts,
25 not surprisingly, than the Ninth Circuit, and it does appear

1 that that particular defendant was yelling, was not -- I think
2 it's described that he was not obeying repeated commands over
3 several minutes. There's plenty of -- there's actually more
4 than one person who views him with a firearm. Those tips in
5 that case are unequivocal. They see him with a firearm, and
6 there's a number of them. And then he starts running for some
7 reason. I mean, there's a lot of facts there that you can
8 imagine would and do relate to the totality of the
9 circumstances analysis that is required for this Court to do in
10 this case.

11 So, you know, the main argument here is that factually
12 it's distinguishable and that it does not have a direct
13 requirement on this Court. It's not direct authority for this
14 Court to be able to or not be able to find that there was an
15 arrest in this case or to find that the weapons search of the
16 car in this case was justified. So, you know, that's the
17 primary thing. I think if there's particular points of law
18 that relate to the *Vandergroen* case that the Court is
19 interested in, I would like to respond to those more
20 specifically. I'm not familiar with the *Morris* case that
21 Mr. Pennekamp cited, so I would ask for additional time to read
22 that.

23 THE COURT: I will allow some supplemental briefing to
24 address the impact of *Vandergroen* and *Morris* on this case. So
25 we can talk about a schedule at the end of the hearing.

1 In terms of how cooperative or not Mr. Macken was,
2 just help me understand your position factually. I'll start
3 with Ms. Labaree on this one. I think the defense
4 characterizes what happened as Mr. Macken simply invoking his
5 Fifth Amendment rights, but the government says he didn't
6 comply with the command to get his hands outside of the
7 vehicle, I don't know for how long exactly the government would
8 say that was, and that during that time when he wasn't
9 complying with the order to show his hands, he was -- it wasn't
10 just generalized furtive movements. It was movements around
11 the area to the left of the steering wheel that the officers
12 could clearly see.

13 So Ms. Labaree, is it not fair to say that Mr. Macken
14 was uncooperative, at least in that respect, even if he pulled
15 over, didn't speed away? Even if he ultimately complied with
16 getting out of the car and submitting to handcuffing, there was
17 this period of time where he was not compliant, fair?

18 MS. LABAREE: No, your Honor. We're not conceding
19 that point. I'm not sure if that was clear in my briefing.
20 We're not conceding. And I have reviewed the various lapel cam
21 footage extensively in an effort to corroborate exactly what
22 the officers are saying. I've read the reports, and I
23 understand that officers have said, you know, he was moving
24 around. We could see him put an object in this place. We
25 don't see that point. It's not visible in any single one of

1 the cameras. So to the degree that that again is a decision
2 point, I think we would need an evidentiary hearing in this
3 case to resolve it.

4 THE COURT: That was my next question, do you need a
5 hearing.

6 MS. LABAREE: I think on that point we do. And, you
7 know, I will say that this term "uncooperative" can act as sort
8 of a -- it can often state exactly what the nature of that
9 cooperation is or isn't. My footnote as to Officer Centella's
10 use of the term was intended to sort of -- as a nod to that --
11 to that use of that language which is uncooperative can mean he
12 didn't cooperate with us wanting to know exactly everything
13 that was in his mind, right? He didn't want to give a
14 statement. He wanted to invoke his rights. And I'm not saying
15 that that's necessarily the extent of the lack of cooperation
16 here, but that's the only thing that they were describing
17 because I understand that the officers do describe a different
18 type of uncooperativeness, but I think that term alone cannot
19 serve as sort of a panacea to just justify the need for more
20 intrusion by law enforcement.

21 THE COURT: All right. Understood.

22 So Mr. Pennekamp, on the -- if this is a decision
23 point, something I will decide, you would agree an evidentiary
24 hearing is needed to test the officers' credibility because the
25 Court can't resolve the question of lack of cooperation solely

1 on the record before it?

2 MR. PENNEKAMP: I think that the Court can resolve
3 this issue on the record before it. I mean, at this point the
4 government has submitted declarations from each of the three
5 officers. They told you that they will testify as to the facts
6 stated in their police reports. So they stand by those facts.
7 And I don't think there's a real dispute other than counsel's
8 argument about what occurred in this case. The police reports
9 are clear about the kind of noncooperative behavior they're
10 talking about. They -- and the videos confirm this.

11 Mr. Macken was ordered to put his hands outside the
12 window and keep his hands up. He was given some subsequent
13 commands about turning off the vehicle and dropping the keys
14 outside the window, but the police reports are unanimous that
15 despite those commands Mr. Macken kept pulling his hands inside
16 the vehicle window outside of the officers' view.

17 And perhaps most concerning, and we didn't discuss
18 this in the briefing, but it's clear in the reports, Mr. Macken
19 was not given a command to open the door. He nevertheless
20 opened it himself. So he started to get out of the vehicle
21 before the officers had told him to do so which raises obvious
22 safety concerns for officers responding to an incident where
23 they -- everybody agrees reasonably suspect a weapon to be
24 present. So he opens the door. As he's opening the door, as
25 the Court mentioned, this isn't just an individual who is

1 confused about what he's supposed to do about keeping his hands
2 up. He actually deliberately reaches to the dash compartment,
3 places a dark object in the dash compartment, puts the cover
4 back on, and then continues getting outside the vehicle.

5 So there is an argument from counsel that Mr. Macken
6 was confused, and he was not trying to be noncompliant. I just
7 don't think that that's reflected in any of the facts before
8 the Court.

9 And I think, you know, to the extent there's a
10 question about how uncooperative one needs to be in order to
11 justify additional uses of force, I mean, it is -- there
12 doesn't have to be yelling and running and kicking and
13 screaming. In the *United States versus Greene* case that we
14 cite in our brief, the kind of noncooperation that the Ninth
15 Circuit said warranted additional use of force, in that case
16 was the person had been told to put his hands on the headliner
17 of the vehicle, and he didn't do it.

18 So, you know, again we think the kind of noncompliance
19 at issue here combined with the fact that everyone agrees there
20 was reasonable suspicion a weapon was present is the kind of
21 scenario that would authorize the officers to do exactly what
22 they did here which is perform a guns-drawn stop requiring him
23 to exit the vehicle, handcuff him, place him in the back of a
24 patrol vehicle for just a few minutes. Depending on when you
25 think the stop began, we're talking about three to five minutes

1 before the gun was found. So again, we think that's -- the
2 Court can make that decision on the record before it right now.
3 I don't know that an evidentiary hearing is going to add
4 anything to the Court's analysis in this case.

5 THE COURT: All right. I understand those competing
6 positions. I'm going to ask my questions, and then you can
7 make brief wrap-up argument if you want, also recognizing
8 you'll have the supplemental briefing opportunity.

9 So on a different question, Ms. Labaree, you referred
10 to it earlier during this hearing, but I gather you are not
11 conceding that the officers were hearing over dispatch the
12 officer who was monitoring the camera and his description; is
13 that right?

14 MS. LABAREE: No. Actually, it's my understanding
15 from reading the police reports is that at least two of the
16 officers were able to hear the tip over dispatch.

17 THE COURT: All right.

18 MS. LABAREE: To me that actually strengthens our
19 position because there's certain cases such as *Vandergroen*
20 where there's discrepancy potentially between what's reported
21 and then what actually reaches the officers ears. So in this
22 case they can hear full well the caveats that Y45, the city
23 camera operator, puts into his report of a potential --
24 something, an object that might be a weapon, right? There's
25 nothing equivocal about it. So I don't -- that's my read of

1 the police report.

2 THE COURT: I understand that argument. So you're not
3 disputing though that the officers did hear the officer
4 monitoring the camera say that he looked -- he thought he saw
5 something black in the shape of a semiautomatic handgun?

6 MS. LABAREE: I'm not disputing that, no, your
7 Honor.

8 THE COURT: All right. And that he could see it on
9 the console?

10 MS. LABAREE: "It" being the object?

11 THE COURT: Right.

12 MS. LABAREE: Yes.

13 THE COURT: And that he described -- the officers who
14 pulled Mr. Macken over also heard that monitoring officer
15 describe the transaction, the suspicious transaction in the
16 parking lot, correct?

17 MS. LABAREE: Well, again, we wouldn't concede that
18 it's suspicious, but there's an exchange, correct. I might
19 just correct the record, my own record on that point. In
20 reading back through the reply, I realize I perhaps conceded
21 too much because, in reviewing the audio of Y45, it's clear
22 that he makes reference to this man that he sees in the parking
23 lot and that some type of exchange occurs within the vehicle.
24 But that I think in my reply I overstated a bit. And they say
25 this object was exchanged, and I don't think that that's at all

1 clear from the tip; and that's not what the information was
2 that the officers were operating on during this event.

3 THE COURT: But the monitoring officer did describe
4 the passenger getting out of the front seat moving to the back,
5 the third person getting in the car.

6 MS. LABAREE: Correct.

7 THE COURT: All right. And the government doesn't
8 dispute that there was some qualifying language in the
9 monitoring officer's description of what that officer thought
10 he was seeing, right, Mr. Pennekamp?

11 MR. PENNEKAMP: So I mean, to the extent the Court is
12 asking whether we think the camera operator's report was
13 equivocal or was somehow wishy-washy about whether or not a gun
14 was present, I don't think we concede that this was an
15 equivocal report. I mean, I think this is a trained, retired
16 police officer observing a suspicious exchange and reporting to
17 the best of his ability. You know, he's not there to hold the
18 gun. He can't say with a hundred percent certainty that what
19 he saw was a gun, but what he tells the officers over the
20 radio, which they hear, is that he believes he saw an exchange
21 involving an item with a distinctive shape of a semiautomatic
22 firearm.

23 I don't think we think it's equivocal. To the extent
24 there is any sort of equivocalness to that statement, I don't
25 think it's material to the officers' decision-making process in

1 stopping the vehicle. In the *Vandergroen* case, which we've now
2 discussed at length, the reports that the officers heard from
3 the bartender tip was -- in the opinion it says the patrons,
4 quote, think they saw a suspect carrying a pistol. So in that
5 case it wasn't even a definitive, yes, for sure this person one
6 hundred percent has a gun on him.

7 You know, we're all human. We can't make any
8 statements with any one hundred percent degree of certainty,
9 and I think that's what occurred here. And, you know, we talk
10 about this in our brief as well. You know, to the extent it
11 matters as a legal matter, the cases are clear that even
12 probable cause doesn't require one hundred percent certainty.
13 Some equivocation is okay.

14 In this case, you know, the officers heard a report
15 again from a trained law enforcement officer explaining what he
16 saw. They interpreted that report as this operator has seen a
17 gun exchange. This is not equivocation in the police officers'
18 understanding of what the operator was telling them. And so
19 for those reasons, we think again probable cause exists, at the
20 very least reasonable suspicion exists justifying the officers'
21 actions in this case.

22 THE COURT: All right. I understand that position.
23 Again, you can return to it in wrap-up if you want. Just
24 clarifying a few other matters, does the defense agree that the
25 officers didn't need to know that Mr. Macken was a felon for

1 any arrest, if it's an arrest, to be proper, Ms. Labaree?

2 MS. LABAREE: An arrest based on the presence of the
3 weapon in the car?

4 THE COURT: (Nods head.)

5 MS. LABAREE: Correct.

6 THE COURT: And the defense, I know you address
7 *Michigan v. Long* in your reply, so you agree it's applicable to
8 this case?

9 MS. LABAREE: It clearly has bearing on this case,
10 yes.

11 THE COURT: And so even if Mr. Macken was restrained
12 and wasn't going to break away to try to get the gun, the
13 government in a footnote, I believe, points out that, if
14 released, he was going to return to the car where the gun was.
15 Isn't that a factor here, Ms. Labaree?

16 MS. LABAREE: Your Honor, yes. And I did address it
17 in the reply. I think that -- I think that there is something
18 else that has to be analyzed in the context of applying
19 *Michigan v. Long* here, and I attempted to address it, which is
20 that as I note, there's not a single other attempt beyond the
21 intrusiveness of conducting the search of the car to
22 investigate the basis of the stop, and so just because there's
23 a potential weapon involved and just because *Michigan v. Long*
24 says, hey, this person isn't necessarily going to be arrested
25 at this point, it does not give categorical authorization to

1 law enforcement to immediately abdicate their duty to in fact
2 investigate something at a level less than total intrusion.
3 And that's the *United States v. Grigg* case that I quote, that I
4 cite. It does note that when the court is assessing the
5 reasonableness of the law enforcement's actions, they do look
6 at whether any other options were available. And that's why I
7 keep pointing to the fact that, as I say in my brief, there's
8 no attempt to verify the details of probation.

9 THE COURT: I understand that.

10 MS. LABAREE: And there's no gesture towards anything
11 other than an immediate car search. One thing I will say in
12 response to Mr. Pennekamp's remarks, you know, it is an
13 equivocal tip. Y45, the city camera operator, does say it's
14 pretty dark. It looks like it's the shape of an automatic
15 weapon. And yet this gets translated in numerous police
16 reports to a full sail there is a gun in this car. And I don't
17 think that's a mistake. I think that's because the police
18 officers hearing it don't hear the doubt, and they abdicate
19 their responsibility to rely not only on the certainty embedded
20 in the tip but also on the doubt.

21 So, you know, it is an arrestable offense once they
22 find the weapon even before they know he's a felon, but it's
23 actually a misdemeanor offense at that point, which I note in
24 my motion, and so this entire episode is based on an equivocal
25 tip of a misdemeanor offense.

1 THE COURT: I understand those arguments, and I
2 understand your position that the officers were required to
3 take those additional steps and the government's position that
4 they weren't. So I understand those arguments.

5 Let me ask the government. Just checking a few facts,
6 it's not disputed that officers cleared the car; that is, they
7 did an initial check of the car, didn't see the gun, right?

8 MR. PENNEKAMP: That's right, your Honor. I believe
9 four officers are stacked up in line, went and did a very quick
10 sort of protective clearance of the car, and they did not find
11 the gun at that point because it was hidden behind a
12 compartment in the dash.

13 THE COURT: And it's not disputed either, as the
14 defense points out, the police officers' reports, more than one
15 say the gun was in plain view. So that's an inconsistency,
16 right? And is that a red flag again requiring at least probing
17 of the officers' credibility?

18 MR. PENNEKAMP: I'm sorry, your Honor. I just lost
19 audio on my headphones unfortunately. Could you repeat the
20 question about the one after the clearance question.

21 THE COURT: More than one of the officers say in their
22 written reports that the gun was in quote, unquote, plain view.
23 The defense calls this out in its briefing. I think
24 undisputed, you agree, the gun was -- it was not just stuck
25 under a dashboard. There was a cover that had to be opened to

1 find the gun. So assuming that's correct, why is there not an
2 inconsistency in the officer's reports that would call for an
3 evidentiary hearing if I need to resolve that issue?

4 MR. PENNEKAMP: Understood. So we would concede that
5 at the time the gun was found it was not in plain view. It was
6 definitely covered up by the compartment. Now to the extent an
7 explanation for the discrepancy needs to be made, I think it's
8 just a trick of timing from each officer's perspective.
9 Officer Clark is the one who immediately after the clearances
10 walked to the vehicle, removed the dash compartment, and saw
11 the gun. He left the cover off of the dash compartment. So
12 now the gun is exposed in plain view. Only later does Officer
13 Centella approach the vehicle, and he looks inside the vehicle
14 and he says, oh, I see the gun. So his plain view explanation
15 in the report is not some alteration of the facts. He's just
16 reporting what he saw from his perspective. This was not a
17 plain view search, so I don't think that that alone would
18 warrant an evidentiary hearing.

19 THE COURT: And Officer Clark himself never says plain
20 view?

21 MR. PENNEKAMP: That's correct, your Honor.

22 THE COURT: Do you agree with that regarding Clark's
23 reporting of the incident after the fact, Ms. Labaree?

24 MS. LABAREE: Yes, your Honor.

25 THE COURT: All right.

1 All right. Finally, for the defense, and then I would
2 allow wrap-up argument, is the government correct that you're
3 abandoning arguments regarding the city camera's capture of
4 images serving as a Fourth Amendment violation and the ongoing
5 search after the gun is found?

6 MS. LABAREE: Your Honor, we're not challenging the
7 ongoing search because there's nothing revealed that Mr. Macken
8 is being charged for. You know, I put that in there to sort of
9 point out that there might be other violations going on in the
10 course of the stop that might be of interest in the totality of
11 the circumstances analysis. We're not calling the initial
12 viewing of the interior of Mr. Macken's car a violation of the
13 Fourth Amendment, no. But to be clear, I think the reason is
14 not because I don't think that the initial -- that the use of
15 the camera might constitute a search, but because under the
16 controlling law, since it might be in plain view anyway, it's
17 sort of street level without the use of the heightened
18 technology, then we really don't have an argument. I do -- in
19 any case, I don't like to use the word "abandoned," but we're
20 not going forward with that, no.

21 THE COURT: I'm just trying to figure out my job.
22 There's nothing for me to resolve there, right?

23 MS. LABAREE: There's nothing to resolve there,
24 correct.

25 THE COURT: All right. I have no other questions. So

1 I would allow brief wrap-up argument if there's something not
2 covered by the current briefing or our discussion, and then we
3 can set a schedule for supplemental briefing.

4 So Mr. Pennekamp and then Ms. Labaree could have the
5 last word.

6 MR. PENNEKAMP: Sure. Just to respond to a few points
7 Ms. Labaree made. First, on the sort of, quote, dark object
8 language in the camera operator's report, I think, you know, it
9 is -- reasonable minds, I guess, could differ about what the
10 camera operator meant when he said that it was dark and then he
11 said it has the shape of a semiautomatic firearm. The
12 officer's -- it's pretty clear from the reports, if you look at
13 Officer Centella's report in particular, he says that the
14 camera operator said he saw a dark object in the shape of a
15 gun. Now again maybe there is a difference of opinion about
16 what the camera operator was attempting to communicate by
17 saying it was dark, but again, it's not a dispute that is
18 material to the decision-making process here.

19 Officers are allowed to make reasonable determinations
20 of a fact of a case in making their reasonable suspicion or
21 probable cause determinations. And even if we were to say that
22 it was a mistake for the officers to think that the camera
23 operator was saying that the gun was dark versus it's dark
24 outside, that's a reasonable mistake of fact that would not be
25 held against the officers for purposes of determining whether

1 or not reasonable suspicion exists.

2 Now on the question of whether or not this was a
3 misdemeanor versus a felony stop, we would point out that
4 California law makes it a felony offense, not a regular
5 misdemeanor offense to carry a concealed weapon in a vehicle
6 when you are not in lawful possession of the firearm. This
7 case involves what we would say is a suspicious gun exchange in
8 a parking lot at night involving a person walking up to a
9 vehicle handing a gun to another person and then walking away.
10 That is not how guns are typically lawfully exchanged and
11 possessed, and so we do think that the facts of this case give
12 rise to the belief that this case involved a felony justifying
13 the stop.

14 But again, even if we said that this was a misdemeanor
15 offense, that doesn't change this Court's analysis in this case
16 given that it was a misdemeanor gun crime, and again the
17 *Vandergroen* decision sort of discusses this specific aspect of
18 whether or not it was a misdemeanor versus a felony, it doesn't
19 matter because we're talking about a dangerous situation.

20 Finally, on the *Michigan versus Long* point, which
21 Ms. Labaree made in her remarks about how maybe there was some
22 alternative that the officers could have used to investigate
23 the case further before searching the dash compartment and
24 finding the gun, I would note that the *Michigan versus Long*
25 case specifically addresses this issue and finds that there is

1 no requirement in the *Michigan versus Long* context where you
2 have reasonable suspicion of the presence of a dangerous
3 weapon. There is no separate requirement that the officers
4 take less intrusive means before conducting that *Michigan*
5 *versus Long* search.

6 The dissent in that case specifically said, well, the
7 officers in *Michigan versus Long* could have done something
8 else. They could have asked for consent to search, for
9 example. And the majority rejects that. Specifically, there's
10 a footnote in the majority opinion at footnote 16 that says,
11 you know, we decline to adopt this sort of less-intrusive
12 approach, and the reason is that, again, when we're talking
13 about reasonable suspicion of the existence of a dangerous
14 weapon in the context of a traffic stop, these are inherently
15 dangerous situations, and the Court didn't want to place
16 officers in a position of having to make these sort of judgment
17 calls about, well, is there something more I can do before I
18 secure this dangerous weapon that I believe exists.

19 So we don't think that's a basis for granting the
20 suppression motion here. For other reasons we state in our
21 brief, we ask that the Court deny the suppression motion.

22 THE COURT: All right. Ms. Labaree.

23 MS. LABAREE: Yes. So I think when this Court asked
24 the government earlier, you know, does the government dispute
25 that there's some sort of equivocation embedded in the tip

1 itself, the government said no, to the degree that, you know,
2 there is language saying there appears to be a firearm,
3 et cetera, but it appears that every time this issue keeps
4 coming back up, the government sort of argues these absolutes.
5 So either it's important to the legal analysis that there's
6 equivocation or it's not. Our client -- our position is
7 clearly that it is important to the legal analysis that there
8 is equivocation and that we think it's clear equivocation in
9 the tip. So I just want to sort of point that out.

10 This whole thing about the dark object, you know, the
11 reality is that it -- it's clear that from the police officers'
12 reports that they heard this tip. They translated it
13 immediately into a definite weapon. I think that seems to be
14 what's true. Whether that's reasonable or not is another
15 question, and that goes to -- back to the defense request for
16 an evidentiary hearing to the degree that credibility of
17 officers is at issue here. And the government offers much
18 speculation as to why Officer Centella may have wrote his
19 report that, what they meant by cooperative. Apparently it's
20 very clear what they meant by uncooperative from reading the
21 reports. If there are factual issues that the defense does not
22 concede that the police -- various police say in their reports,
23 I think that's a factual issue that needs to be resolved to the
24 degree that it might affect this Court's ruling. So we would
25 just reiterate our request for that.

1 Also as to this point regarding a felony stop versus a
2 misdemeanor stop, you know, at the time that the officers
3 pulled Mr. Macken over, all they knew was that there was maybe
4 a weapon in the car. None of the aggravators making this a
5 felony stop -- a felony were present or known to the officers
6 at the time. So I think that's abundantly clear, and I'm not
7 sure why we're even discussing whether or not they would have
8 that knowledge because I think it's very, very clear and
9 undisputed that all they had at that time was an unknown
10 person.

11 And another thing is I don't -- I really don't want
12 the record to be messed up on this point which is that the
13 government keeps using the term "gun exchange" when the
14 government discusses -- the Y45 reports that he witnesses when
15 the other man comes up to the car. I quote exactly what the
16 audio says in my original motion, and he says he was talking to
17 another guy, that he just walked off. They did kind of an
18 exchange within the vehicle. The guy walked off. So there's
19 just simply not a basis for the government to argue that this
20 was a gun exchange. That's certainly something that the
21 officers can elaborate on if that appears to be a materially
22 important fact, but it's not in the record right now.

23 THE COURT: And when you say a "gun exchange," you
24 mean two guns being exchanged?

25 MS. LABAREE: The way that I read -- the way that I

1 heard it is the exchanged guns in the vehicle. At least the
2 way that I understand the government to be using that phrase is
3 that the exchange in the vehicle is of the weapon, is of the
4 object that might be a weapon.

5 THE COURT: All right. So gun for gun, could have
6 been gun for money or just --

7 MS. LABAREE: Object. By exchange, I think it meant
8 handoff, right? Like I don't -- I'm not being super specific
9 about that, but I think the point here is just that is not the
10 substance of the tip. That is not what was said. That is not
11 the information that officers had at that time.

12 THE COURT: All right. I understand that issue. But
13 on the misdemeanor point, just so I'm clear, is also part of
14 what you're saying is because they didn't know anything about
15 the person in the car, they also couldn't rule out the
16 possibility the person had a CCW permit? Is that what you're
17 saying?

18 MS. LABAREE: No. I'm not saying that. I am not
19 contesting the point that currently in California CCW's are so
20 rare that, you know, it is presumptively a crime to see
21 somebody carrying a weapon that is concealed, okay? But the
22 California Penal Code that's being cited, I think it's 24500,
23 that is concealed carry. That's the illegal concealed carry,
24 and it is a misdemeanor under that statute without specific
25 aggravators. One of those aggravators might be that you're a

1 felon, right?

2 THE COURT: Okay.

3 MS. LABAREE: You know, and again, just in terms of
4 *Michigan v. Long*, I think this idea that the government said,
5 you know, the Supreme Court recognized that these are
6 inherently dangerous situations. Well, you know, there are
7 certain facts in *Michigan v. Long* that are akin to the facts in
8 Mr. Macken's case, and there are some that are not. And so to
9 the degree that we can just simply lump it all together and
10 say, oh, this fits under *Michigan v. Long*, and therefore, in
11 this particular case based on these specific facts under the
12 totality of the circumstances in this specific case a
13 protective search was justified. I just don't think that's
14 what *Michigan v. Long* stands for. It doesn't create a
15 categorical rule there.

16 And I think that's what's difficult about the Fourth
17 Amendment analyses is that there is -- there are very few
18 categorical rules. And as I point out in my motion, there's
19 also no categorical rule that where a weapon is present, sort
20 of no holds barred, you can search as quickly as you want, you
21 have no obligation to do any other type of investigation, you
22 have no obligation to sort of reduce the intrusiveness no
23 matter how flimsy or how full of doubt the tip is.

24 So, you know, the motion here is really based on the
25 level of intrusion from start to finish of this stop and

1 whether the knowledge of the police officers at the time they
2 were taking each step justified that level of intrusion, and
3 our argument is that it did not.

4 THE COURT: I understand that argument. This has been
5 very helpful. Thank you.

6 What kind of schedule do you need for supplemental
7 briefing, and how do you want it to proceed? Is simultaneous
8 all right, or do you want serial briefing, Ms. Labaree?

9 MS. LABAREE: I would be fine with simultaneous, your
10 Honor.

11 THE COURT: All right. And then how long would you
12 need for a supplemental brief?

13 MS. LABAREE: I'd like to say two weeks, although I
14 apologize to Mr. Macken who is watching me ask for more time,
15 but I think to do a fair job I would like two weeks.

16 THE COURT: So August 3rd. Mr. Pennekamp, that work
17 for you?

18 MR. PENNEKAMP: It does, your Honor. I would ask for
19 clarification, specifically what you would like us to
20 supplement. My understanding is you want us to respond to the
21 application of the *Vandergroen* case and the *Morris* case. Is
22 there something else you would like us to address?

23 THE COURT: No. It's really for that limited purpose,
24 supplemental briefing explaining how the Ninth Circuit's
25 decision now in *Vandergroen* applies to this case and also the

1 *Morris* case Mr. Pennekamp mentioned for the first time.

2 You got the cite for that, Ms. Labaree?

3 MS. LABAREE: I did, yes. Thank you.

4 THE COURT: All right. So also addressing *U.S. v.*
5 *Morris*, each of you may in writing explain how you believe that
6 case relates to this one. I would say you could do that in ten
7 pages max. Fair, Ms. Labaree?

8 MS. LABAREE: That's fine, yes.

9 THE COURT: Mr. Pennekamp?

10 MR. PENNEKAMP: Yes, your Honor. That should be more
11 than sufficient.

12 THE COURT: All right. So ten pages by August 3rd and
13 then we can set this for further status on August 10th.

14 Ms. Labaree?

15 MS. LABAREE: That's fine, your Honor. Thank you.

16 THE COURT: Mr. Pennekamp?

17 MR. PENNEKAMP: Your Honor, I am supposed to be on
18 vacation that day, but if we're doing this by Zoom, I think I
19 should be able to appear.

20 THE COURT: You know, once it's submitted -- upon the
21 submitting of supplemental briefing, it will be submitted. I'm
22 noting that this was set for both motion hearing and status. I
23 guess let me clarify. Typically the Court has under the Speedy
24 Trial Act up to 30 days to resolve a motion. So the other
25 option would be to set a status out with sufficient time for

1 the Court to attempt to resolve the motion, so setting it for
2 mid-September. Any objection to that, Ms. Labaree, so that you
3 know hopefully by the September date how I've decided the
4 motion?

5 MS. LABAREE: In light of the fact that my client is
6 in custody, your Honor, I would object to such a far-out
7 schedule, and in fact, I would be okay with a week's deadline
8 to the briefing if it meant that we could come back to court
9 and take the ruling on August 3rd.

10 THE COURT: Well, I think it's better to stick with
11 August 10th if we're going that direction, and I could see if I
12 could be ready with a bench order. That might be possible.

13 And Mr. Pennekamp, there's no one else who could cover
14 for you if for some reason you couldn't connect from wherever
15 you are?

16 MR. PENNEKAMP: I will be able to cover the hearing,
17 your Honor. I'm not traveling anywhere, if that's what you're
18 asking.

19 THE COURT: All right. Well, you volunteered that. I
20 realize it has implication given the current public health
21 orders.

22 All right. Well, August 10th then for further status,
23 and I'll look for your supplemental briefing. And I will see
24 if I can get to a bench order by then.

25 All right. Anything further, Mr. Pennekamp?

1 MR. PENNEKAMP: No, your Honor. Thank you.

2 THE COURT: Ms. Labaree?

3 MS. LABAREE: No, your Honor. Thank you.

4 THE COURT: All right. You may sign off.

5 THE CLERK: Court is in recess.

6 (The proceedings adjourned at 10:37 a.m.)

7 --oOo--

8 I certify that the foregoing is a correct transcript from the
9 record of proceedings in the above-entitled matter.

10 /s/ Kacy Parker Barajas

11 _____
12 KACY PARKER BARAJAS
13 CSR No. 10915, RMR, CRR, CRC
14
15
16
17
18
19
20
21
22
23
24
25